Yeo Liong Ho v Loh Choon Hooi

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–414 OF 2000
HELILIAH, KN SEGARA AND RAMLY ALI JJCA
27 OCTOBER 2009

Civil Procedure — Jurisdiction — Equitable jurisdiction, exercise of — Whether trial court ought to have exercised its equitable jurisdiction to relieve appellant from any strict adherence to time — Whether time for completion was made essence of contract by service of notice of termination

Contract — Sale and purchase of land — Breach — Failure to pay balance of purchase price on time — Failure to obtain state consent to transfer within stipulated time — Whether respondent acted lawfully, equitably and in good conscience in terminating SPA by way of notice of termination on grounds that balance of purchase money not received on time — Whether time was of essence in performance of contract

The appellant entered into a sale and purchase agreement ('the SPA') with the respondent to purchase a piece of land together with a double-storey terraced house at No 14 Jalan PJS 7/20, erected thereon ('the property') for RM128,000. The respondent however was only the beneficial owner of the property at the date of the agreement and the sale of the property was subject to state consent which had yet to be obtained. Upon the execution of the SPA RM1,000 was paid by the appellant as deposit and part payment towards the purchase price. The balance of the purchase price was to be paid within three months from the date of the SPA provided that the respondent had obtained state consent to transfer. However, if the respondent failed to obtain the consent within the three months from the date of execution of the SPA, then the agreement was to be extended for a further three months to provide the respondent with further time to obtain the consent of the state authority. The appellant thereafter applied for, and obtained a housing loan for a sum of RM115,000 from Malayan Banking Bhd ('MBB') and the bank was duly informed that the sale of the property was subject to state consent. On 14 May 1991, the appellant was informed by their common solicitors that the state consent to transfer had yet to be obtained and that the last date for the completion of the purchase was on 21 August 1991. The respondent thereafter failed to obtain the consent to transfer at the expiry of the extended consent period, which was 21 August 1991. However, the appellant did not

A exercise his right to terminate the SPA and did not subsequently impose a time limit for the vendor to obtain the consent to transfer. The respondent's application for consent to transfer was finally approved by the state authority on 9 May 1992 and the common solicitors informed MBB and the parties to the SPA of the same. On 7 June 1992 the appellant paid the differential sum B of RM11,800 to the respondent who acknowledged receipt of the same. On 17 August 1992, the respondent wrote to the appellant requesting that the balance of the purchase price be paid within one month from her letter dated 17 August 1992, ie on or before 17 September 1992, failing which she would C rescind the SPA and refund the sum of RM12,800 to the appellant. On 16 September 1992, MBB completed registration of the transfer and charge of the property. Thereafter on 17 September 1992, MBB issued a banker's cheque for RM115,200 in favour of the respondent which was couriered to the respondent's solicitors on 19 September 1992. However, on the same date D the respondent wrote to the appellant to terminate the SPA on the ground that the appellant had failed to settle the balance of the purchase price by 17 September 1992. The respondent then filed an action against the appellant to re-transfer the property to the respondent free of encumbrance and in particular free of the appellant's charge on the property. The appellant filed E his defence and counterclaimed for specific performance of the SPA. The trial judge allowed the respondent's claim and dismissed the appellant's counterclaim with costs. This was an appeal against that decision. The only issue for determination in this case was whether the respondent had acted F lawfully, equitably and in good conscience in terminating the SPA by way of a notice of termination darted 19 September 1992 on the grounds that the balance of the purchase money had not been received on or before 17 September 1992 and consequently refusing to accept the balance of the purchase price received on 21 September 1992.

G

Held, allowing the appeal with costs here and below:

H (1) (per **Heliliah JCA**) The decision of the court was based on the record of appeal lodged and the submissions made at that time. If there were a change of circumstances or a fresh situation had arisen in the property since that time, the parties should have sought to file documents supplementary to the record of appeal to enlighten the court as to the changed circumstances (see para 3).

I (2) (per **KN Segara JCA**) The respondent had acted in bad faith and unconscionably in issuing the notice of termination on 19 September 1992 when the balance of the purchase price had already been dispatched on 19 September 1992. In fact the respondent vendor was

keener to terminate the SPA rather than to complete it because of more favourable market conditions for her to obtain a higher price for the property (see paras 35 & 37).

(3) (per **KN Segara JCA**) For all intents and purposes the appellant had in fact complied with the dateline set by the respondent in her letter dated 17 August 1992 to pay the balance of the purchase price because the common solicitors received the banker's cheque on 21 September 1992. Further, there was no evidence of when the respondent's letter dated 17 August 1992 was received as the AR card was never produced to show the date of receipt by the purchaser. The vendor had thus unilaterally fixed 17 September 1992 as the completion date in the notice (see para 39).

(4) (per **KN Segara JCA**) In equity, time is not usually the essence of a contractual term. In the present case, although the SPA did stipulate that time was of the essence of the contract, when the respondent was unable to obtain the state consent within the stipulated time in the SPA, and the agreement was not terminated by the appellant, time for completion by the appellant was necessarily at large. Further, the respondent had failed to fulfill two of the requirements to be satisfied if time for completion was to be made the essence by the service of a notice. Therefore, the respondent could no longer make time of the essence by the letter dated 17 August 1992. This meant that even if there was a failure to comply with a condition as to payment of the balance of the purchase price before 17 September 1992, the trial court in the exercise of its equitable jurisdiction ought to have relieved the appellant from any strict adherence to time. The trial judge had failed to address her mind on this equitable issue and therefore clearly misdirected herself in law and fact (see paras 40–41, 44 & 45–46).

[Bahasa Malaysia summary

Perayu telah menandatangani perjanjian jual beli ('PJB') dengan responden untuk membeli sebidang tanah bersama dan rumah teres dua tingkat No 14 Jalan PJS 7/20 yang dibina di atasnya ('hartanah tersebut') untuk RM128,000. Responden bagaimanapun hanyalah pemilik benefisiari hartanah tersebut pada tarikh perjanjian dan jualan hartanah tersebut tertakluk kepada persetujuan kerajaan negeri yang masih belum diperolehi. Selepas penyempurnaan PJB RM1,000 telah dibayar oleh perayu sebagai deposit dan sebahagian daripada bayaran terhadap harga belian. Baki harga belian perlu dibayar dalam tempoh tiga bulan dari tarikh PJB kecuali jika responden telah memperoleh persetujuan kerajaan negeri untuk pindah milik. Walau bagaimanapun, jika responden gagal untuk mendapatkan persetujuan tersebut dalam tempoh tiga bulan dari tarikh penyempurnaan

PJB maka perjanjian tersebut hendaklah dilanjutkan untuk tiga bulan lagi bagi memberikan responden masa yang lebih untuk memperoleh persetujuan pihak berkuasa negeri. Perayu kemudian telah memohon dan memperoleh pinjaman perumahan bagi jumlah RM115,000 daripada Malayan Banking Bhd ('MBB') dan bank tersebut kemudian telah memaklumkan bahawa jualan hartanah tersebut tertakluk kepada persetujuan kerajaan negeri. Pada 14 Mei 1991 perayu dimaklumkan oleh peguam bersama mereka bahawa persetujuan kerajaan negeri masih belum diperoleh dan bahawa tarikh akhir untuk jualan diselesaikan adalah pada 21 Ogos 1991. Responden kemudian gagal memperoleh persetujuan untuk pindah milik pada tarikh luput tempoh lanjutan persetujuan, iaitu 21 Ogos 1991. Walau bagaimanapun, perayu tidak menggunakan haknya untuk menamatkan PJB dan tidak seterusnya mengenakan batasan masa untuk penjual memperoleh persetujuan untuk pindah milik. Permohonan responden untuk persetujuan bagi pindah milik akhirnya telah diluluskan oleh pihak berkuasa kerajaan negeri pada 9 Mei 1992 dan peguam bersama telah memaklumkan perkara tersebut kepada MBB dan pihak-pihak kepada PJB. Pada 7 Jun 1992 perayu telah membayar jumlah perbezaan RM11,800 kepada responden yang telah mengakui penerimaan pembayaran tersebut. Pada 17 Ogos 1992 responden telah menulis kepada perayu meminta agar baki harga belian dibayar dalam tempoh sebulan selepas suratnya bertarikh 17 Ogos 1992, iaitu pada atau sebelum 17 September 1992, dan sekiranya gagal dia akan menamatkan PJB tersebut dan memulangkan jumlah RM12,800 kepada perayu. Pada 16 September 1992, MBB telah menyiapkan pendaftaran pindah milik dan gadaian hartanah itu. Berikutan itu pada 17 September 1992, MBB telah mengeluarkan cek bank untuk RM115,200 bagi pihak responden yang telah dikurierkan kepada peguam responden pada 19 September 1992. Walau bagaimanapun, pada tarikh yang sama responden telah menulis kepada perayu untuk menamatkan PJB tersebut atas alasan bahawa perayu telah gagal untuk menyelesaikan baki harga belian menjelang 17 September 1992. Responden kemudian telah memfailkan tindakan terhadap perayu untuk pindah milik semula hartanah tersebut kepada responden bebas daripada sekatan dan khususnya bebas daripada gadaian perayu ke atas hartanah tersebut. Perayu telah memfailkan pembelaan dan tuntutan balasnya untuk pelaksanaan spesifik PJB. Hakim perbicaraan telah membenarkan tuntutan responden dan menolak tuntutan balas perayu dengan kos. Ini merupakan rayuan terhadap keputusan tersebut. Satu-satunya isu yang perlu ditentukan dalam kes ini adalah sama ada responden telah bertindak secara sah, saksama dan dengan niat baik dalam menamatkan PJB tersebut melalui notis penamatan bertarikh 19 September 1992 atas alasan bahawa baki wang belian tidak diterima pada atau sebelum 17 September 1992 dan oleh itu enggan menerima baki harga belian yang diterima pada 21 September 1992.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi: A

(1) (oleh **Heliliah HMR**) Keputusan mahkamah adalah berdasarkan rekod rayuan yang dibuat dan penghujahan-penghujahan yang dibuat pada masa tersebut. Jika terdapat perubahan keadaan atau situasi baru timbul ke atas hartanah tersebut pada masa tersebut, pihak-pihak itu sepatutnya telah memohon untuk memfailkan dokumen-dokumen sokongan kepada rekod rayuan untuk menjelaskan kepada mahkamah berhubung perubahan keadaan tersebut (lihat perenggan 3). B

(2) (oleh **KN Segara HMR**) Responden telah bertindak dengan niat jahat dan tidak berpatutan dalam mengeluarkan notis penamatan pada 19 September 1992 apabila baki harga belian telah dihantar pada 19 September 1992. Bahkan responden penjual ingin sekali menamatkan PJB tersebut daripada menyempurnakannya kerana keadaan pasaran lebih memihak kepadanya untuk memperoleh harga lebih tinggi untuk hartanah tersebut (lihat perenggan 35 & 37). C D

(3) (oleh **KN Segara HMR**) Dalam segala niat dan tujuan, perayu pada hakikatnya telah mematuhi batas waktu yang ditetapkan oleh responden dalam suratnya bertarikh 17 Ogos 1992 untuk membayar baki harga belian kerana peguam bersama telah menerima cek bank pada 21 September 1992. Bahkan tiada keterangan bilakah surat responden yang bertarikh 17 Ogos 1992 telah diterima memandangkan kad AR tidak dikemukakan untuk menunjukkan tarikh penerimaan oleh pembeli. Penjual dengan itu, secara unilateral, telah menetapkan 17 September 1992 sebagai tarikh penyempurnaan dalam notis tersebut (lihat perenggan 39). E F

(4) (oleh **KN Segara HMR**) Dalam ekuiti, masa biasanya bukan intipati terma kontraktual. Dalam kes ini meskipun PJB tersebut telah menetapkan bahawa masa adalah intipati kontrak, apabila responden tidak dapat memperoleh persetujuan kerajaan negeri dalam tempoh yang ditetapkan dalam PJB, dan perjanjian tidak ditamatkan oleh perayu, masa penyiapan oleh perayu semestinya perlu. Bahkan, responden telah gagal mematuhi dua keperluan yang perlu dipenuhi jika masa penyiapan perlu dijadikan intipati melalui serahan notis. Oleh itu, responden tidak lagi boleh menjadikan masa itu intipati melalui surat bertarikh 17 Ogos 1992. Ini bermaksud bahawa meskipun terdapat kegagalan untuk mematuhi syarat berkaitan pembayaran baki harga belian sebelum 17 September 1992, mahkamah perbicaraan dalam menggunakan bidang kuasa kesaksamaannya sepatutnya melepaskan perayu daripada apa-apa kepatuhan terhadap masa. Hakim perbicaraan telah gagal untuk menumpukan mindanya kepada isu kesaksamaan ini dan oleh itu jelas telah salah arah dari segi undang-undang dan fakta (lihat perenggan 40–41, 44 & 45–46).] G H I

Notes

For cases on breach, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4801–4812.

For cases on jurisdiction generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4329–4622.

Cases referred to

British and Commonwealth Holdings Plc v Quadrex Holdings Inc [1989] 1 QB 842, CA (refd)

Yap Hong Too & Anor v Wong Ah Mei & Anor [1997] 1 MLJ 545, FC (refd)

Legislation referred to

Rules of the Court of Appeal 1994

Appeal from: Suit No S4–22–237 of 1993 (High Court, Kuala Lumpur)

Albert Ewe (Wan Ewe Chong & Khoo) for the appellant.
Amarjeet Singh (Zubeda & Amarjeet) for the respondent.

Heliliah JCA:

[1] I have read the judgment of my learned brother, Justice Segara in draft and I agree with it. However I find it imperative to state the following.

[2] Judgment in this case was reserved after the completion of submissions. On the date that we delivered our decision, we found that a fresh situation may have arisen in that the property may now be registered in the name of the appellant, the respondent or even a third party.

[3] Our decision was arrived at on the basis of the record of appeal lodged before us and the submissions made by learned counsel. If we were to reckon with statements from the bar, our decision will not attain finality. Moreover if the parties had really been interested to see the end of the matter, then they should have sought to file documents supplementary to the record of appeal in order to enlighten us of any changed circumstances. The relevant Rules of the Court of Appeal 1994 do not preclude the parties from doing so.

KN Segara JCA:

[4] The appellant ('the purchaser') and the respondent ('the vendor') entered into an agreement dated 22 February 1991 for the sale and purchase of all that piece of land and hereditament known as Suratan Hakmilik

Sementara No HS(M) 4637, No PT 524, Mukim Damansara, Negeri Selangor together with a double-storey terrace house No 14 Jalan PJS 7/20 erected thereon ('the property'). A

[5] The vendor was only the beneficial owner of the said property at the date of the agreement. The legal owner of the property at the material time was not a party to the said sale and purchase agreement. The sale and purchase agreement did not specify the performance of any obligations by the legal owner of the property within any stipulated time to enable the vendor to effect a valid legal transfer of the property to the purchaser. B C

[6] The sale and purchase agreement spells out unequivocally that there are common solicitors acting for the vendor and purchaser in the said sale and purchase transaction namely, Messrs Charles Rajah, Lim Seang Lee & Co from Penang (the 'common solicitors'). D

[7] The agreed purchase price of the property was RM128,000. It was sold free from all encumbrances but otherwise subject to all conditions and restrictions whether expressed or implied in the document of title to the said property. Upon the execution of the sale and purchase agreement the sum of RM1,000 was paid by the purchaser as deposit and part payment towards the purchase price. The balance purchase price of RM127,000 was to be paid on the completion date alluded to in item 2 and 3 of the Sixth Schedule. E

[8] The Sixth Schedule of the sale and purchase agreement provides as follows: F

1. The sale of the said Property is subject to the consent of the State Authority (hereinafter referred to as 'the Consent') and the Vendor(s) shall forthwith upon execution of this Agreement at his/their own cost and expense submit a proper application for the consent. G
2. Subject to the State Authority having given the consent in writing and subject further to the provisions of Item Three below of this Sixth Schedule, the Purchaser(s) shall pay to the Vendor(s) the balance of the Purchase price within THREE (3) months from the date of this Agreement or within TWO (2) months upon notification by the Vendor that the State Authority has given the Consent, whichever shall be the later. H
3. If the Vendor(s) shall fail to obtain the Consent within (3) months from the date of this Agreement, it is hereby mutually agreed by the parties hereto that this Agreement shall be extended for a further period of THREE (3) months commencing from the expiry of the aforesaid period of three months to give the Vendor(s) further time to obtain the Consent and in the event that the State Authority shall refuse to give the I

A Consent or if the Vendor(s) shall fail to obtain the Consent on or before expiry of the sixth month from the date of this Agreement, the Vendor(s) shall forthwith refund to the Purchaser(s) free of interest or cost the said sum of $1,000.00 referred to in Item One of the Third Schedule hereto and any other monies paid by the Purchaser(s) to the B Vendor(s) to account of the purchase price and upon such refund this Agreement shall terminate and be null and void and of no further effect.

4. If the Purchaser(s) shall fail to make or effect payment of the balance of the purchase price or any part thereof by the times and in the manner stipulated in this Agreement, the Vendor(s) shall be entitled to forfeit a C sum equivalent to 10% of the purchase price as liquidated damages and upon such forfeiture this Agreement shall terminate and be null and void and of no further effect.

5. ...

D 6. ...

[9] The purchaser paid the deposit of RM1,000 on 22 February 1991. His application for a housing loan from Malayan Banking Bhd Kuala Lumpur for E a sum of RM115,200 was approved on 20 April 1991 and the loan is to be released in full direct to the vendor subject, inter alia, the following requirements:

(a) execution of all documents (including the security of a first legal charge over a double-storey house held under HS(M) 4542, PT 429, Mukim F of Damansara, District of Petaling known as No 14 Jalan PJS 7120, Bandar Sunway, Selangor;

(b) confirmation that the difference between the loan sum and the purchase price has been fully paid;

G (c) vendor's undertaking to refund the loan sum in the event the transfer is not registered for any reasons whatsoever; and

(d) solicitor's confirmation that all the relevant documents have been presented at land office for registration.

H

[10] On 20 June 1991, Malayan Banking Bhd's solicitors from Kuala Lumpur wrote to the common solicitors in Penang:

H.S (M) 4542, P.T. No. 429

I Mukim & District of Damanasara

Purchaser: Mr Yeo Liong Ho

We act for Malayan Banking Berhad of Menara Maybank, Bukit Mahkamah, 100 Jalan Tun Perak, Kuala Lumpur.

2. Our clients have agreed to grant a housing loan of Ringgit $115,200.00 to the above named purchaser(s)/ borrower(s) to assist her (him) in purchasing the above property. The said loan is to be secured by way of a first registered charge over the said property.

3. …

4. Our clients are prepared to make progressive releases of the said loan to you in accordance with the provisions of the Sale and purchase Agreement subject to the prior fulfillment of the following conditions:-

(1) presentation of the Memorandum of Transfer in favour of the purchaser(s)/borrowers and the charge in favour of our clients for registration with the relevant registry;

(2) a search conducted by us at the time of presentation of the Transfer and Charge reveals that the said property is free from encumbrances; and

(3) Our clients receipt of your letter addressed directly to our clients containing:-

(a) your written confirmation that the difference between the purchase price and the loan amount has been duly settled by the purchaser(s)/borrowers

(b) your clients written undertaking to refund all moneys released by our clients towards account of purchase price of the said property in the event:-

(i) the Memorandum of Transfer in favour of the purchaser(s)/borrower(s) and/or the charge in our clients favour are not or cannot be registered for any reason whatsoever; or

Kindly let us know whether the abovementioned conditions are acceptable by you and if they are, please let us have the following:-

(1) the original issue document of title H.S (M) 4542 P.T. No 429 Mukim & District of Damanasara free from all encumbrances;

(2) the valid and registrable Memorandum of Transfer by you in favour of the purchaser(s)/borrower(s) duly executed, adjudicated and stamped;

(3) the requisite registration fees in respect of the said Memorandum of Transfer;

(4) a certified true copy of the quit rent receipt for the year 1991 paid in respect of the said property;

(5) letter of consent from the relevant state authority consenting to the transfer of the property to the purchaser(s)/borrower(s),if required and

(6) your letter addressed directly to our clients referred to in paragraph 4(3) above for our onward transmission to our clients.

6. Meanwhile, please let us have a photocopy of the Sale and Purchase Agreement, title deed and the Memorandum of Transfer duly executed by yourself and the purchaser(s)/borrower(s) to call on us to execute the charge as we have to ensure that the date of the execution of the said Memorandum of Transfer by the purchaser(s)/borrower(s) is before the date of the execution of the Charge by them as required by the Registrar of Title.

7. We look forward to hearing from you soon.

[11] On 3 July 1991, the common solicitors responded to Malayan Banking's solicitors with a copy extended only to the purchaser at his address in Melaka as follows:

We refer to your letter of 20th June 1991.

We enclose herewith the following for your attention:

(i) Photocopy of the issue document of title; and

(ii) Photocopy of the Sale & Purchase Agreement dated 22nd February 1991.

Kindly acknowledge receipt by signing and returning to us the duplicate copy hereof.

Kindly take note that the sale of the property is subject to State consent which has yet to be obtained. We shall let you have the remaining documents in due course.

Yours faithfully

Encls:

c.c. Mr Yeo Liong Ho

J9392 Taman Maju

Jasin

77000 Melaka

[12] It is to be noted that the common solicitors did not disagree to any of the conditions stated in the bank's solicitors letter dated 20 June 1991 nor furnish all the requisite documents.

[13] On 14 May 1991, the common solicitors wrote to the purchaser residing in Melaka, with a copy to the vendor residing in Penang, to inform him that consent to transfer had yet to be obtained and the last date for the completion of the purchase is 21 August, 1991. The letter reads:

Re: H.S. (M) 4637 No. P.T.524 Bandar Sunway Mukim Damansara Negeri Selangor

We refer to the above.

Please be informed that Madam Loh Choon Hooi has yet to obtain the State consent to transfer the property to you. In the circumstances, the provisions of paragraph 3 of the Sixth Schedule of the Sale and Purchase Agreement shall take effect and the last date for the completion of purchase 21st August, 1991.

Yours faithfully,

c.c. Madam Loh Choon Hooi

No. 12 Solok Tan Jit Seng

Pearl Hill, Tanjong Bungah

11200 PENANG

[14] In response, by letter dated 6 July 1991, the purchaser, inter alia, expressed regret to the common solicitors about the delay in the transaction and asked that the transaction be expedited. The material part of his letter reads:

...

Refer your letter (14th May '91), I was regret to be informed that till to date I have not been able to proceed with the transfer of abovesaid properties. I would appreciate if the matter could be expedited soonest possible. Kindly let me have the copy of the Vendor's application of the State Consent for the transfer entitlement, for my record and perusal. Kindly also illustrate, in writing, the manner in which the grace period is to be extended if the need arises; as per our telephone conversation on 27th of June'91.

[15] Then, before the expiry of the extended completion date (on 21 August 1991) under the provisions of the Sixth Schedule of the agreement, the vendor *wrote personally* to the purchaser, by letter dated 1 August 1991 and demanded payment on or before 21 August 1991 the differential sum between the balance of purchase price and the loan amounting to RM11,800. The vendor had the audacity to impose unilaterally a term not envisaged in the written agreement! Nevertheless, she did not stipulate the consequences of non-compliance. Furthermore, at that date she had not even complied with her primary obligation to obtain the consent from the State for the transfer of the property. It is to be noted that as at 1 August 1991 the purchaser had not asked for any extension of time on his part. He was desirous of the property, and the legal transfer to be effected as soonest as possible. He was ready able and willing to fulfill his part of the bargain under the terms of the sale and purchase agreement. This is clearly reflected in his letter dated 6 July 1991. The letter dated 1 August 1991 from the vendor to the purchaser reads:

A Loh Choon Hooi

No 12 Solok Tan Jit Seng

Pearl Hill

Tanjong Bungah

B 11200 Penang

1st August 1991

Mr Yeo Liong Ho

C Jasin

77000 Melaka

Dear Sir

Sale & Purchase Agreement dated 22nd February 1991

D Property: No H S (M) 4637, No P T 524, Mukim Damansara, Selangor with premises No 14 Jalan PJS 7/2

I refer to the abovementioned Agreement.

E I hereby agree to grant to you an extension of time until two (2) months after notification by me that the State Authority has given consent to the sale of the property to you to complete the purchase. You shall however pay to me a further sum of $11,800.00 being the differential amount between the balance of the purchase price and your housing loan on or before 21st August 1991.

F Yours faithfully

Loh Choon Hooi

G **[16]** The vendor failed to obtain the consent to transfer at the expiry of the extended consent period/completion date (21 August 1991) under the agreement. However, the purchaser did not exercise his right to terminate the sale and purchase agreement and did not subsequently impose a time limit for the vendor to obtain the consent to transfer. In such circumstances, in law,
H we hold time was no more the essence of the contract for the completion of the sale and purchase agreement and, in particular, for the payment of the balance of the purchase price.

[17] The vendor's application for the consent to transfer was approved by
I the state authority on 9 May 1992 and was valid for a period of 12 months from 9 May 1992. It is patently clear from said letter of approval that the vendor made the said application only on 15 January 1992 almost one year from the date of the execution of the sale and purchase agreement. The letter of approval reads:

PEJABAT DAERAH/TANAH

PETALING…… ……..

SELANGOR DARUL EHSAN

Ruj tuan:

Ruj kami: (4)dlm. PTDP. 18/38/92

Tarikh: 9hb Mei 1992

Pn Loh Choon Hooi

No. 12 Solok Tan Jit Seng

Pearl Hill Tanjung Bungah

11200 Pulau Pinang

Tuan/Puan/Tetuan,

Permohonan kebenaran pindahmilik tanah

HS(M) 4637 PT lot 524

Mukim Damansara

Daerah Petaling

Permohonan tuan/puan/tetuan bertarikh 15/1/92 adalah dirujuk.

2. Sukacita dimaklumkan bahawa permohonan tuan/puan/tetuan untuk mendapatkan kebenaran pindahmilik tanah diatas, kepada

En Yeo Liong Ho – k/p:5796785

J 9293 Taman Maju Jasin

77000 Melaka

telah diluluskan oleh Pihak Berkuasa Negeri

Bahagian pindahmilik – semua bahagian

3. Kelulusan ini sah selama 12 bulan sahaja dari tarikh di atas,

4. Sila sertakan surat kelulusan ini bersama-sama dengan borang pindahmilik apabila mendaftarkan pindahmilik.

Sekian terima kasih

……..

Pendaftar Tanah Daerah,

Petaling.

[18] On 20 May 1992, the common solicitors couriered a copy of the consent to Malayan Banking Bhd's solicitors, with a carbon copy of the letter to the purchaser and the vendor.

[19] On 7 June 1992, the purchaser paid the differential sum of RM11,800 to the common solicitors and on 19 June 1992 the vendor acknowledged receipt of the differential sum of RM11,800.

[20] On 17 August 1992 the vendor sent a letter to the purchaser requesting that the balance of the purchase price be paid to her at the latest, *one month from the date of the letter*, and in default thereof she would rescind the sale and purchase agreement and refund the sum of RM12,800. She extended a copy of the letter to the common solicitors. The letter reads:

Mdm. Loh Choon Hooi
No.12 Solok Tan Jit Seng
Pearl Hill, Tanjung Bungah
11200 Penang
17th August 1992

Mr. Yeo Liong Ho
No. J9392 Taman Maju
Jasin
77000 Melaka

A.R. Registered

Dear Sir,

Lot No. PT. 524, H. S. (M) 4637, Mukim Damansara, Daerah Petaling, Selangor together with premises No. 14 Jalan PJS 7/2 Bandar Sunway, 46150 Petaling Jaya

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I refer to the above.

I have on 9th May 1992 obtained the State Authority's consent to transfer the above property to you. Please be informed that I wish the sale and purchase of the property to be completed and the balance of the purchase price paid to me by the latest one (1) month from the date of this letter. If I do not receive the balance of the purchase price within one (1) month, I shall treat the Sale and Purchase Agreement as rescinded and shall refund to you the total sum of $12,800.00 that you have thus far paid me. You are to vacate and re-deliver possession of the property to me upon the rescission of the Sale and Purchase Agreement.

Yours faithfully,
Loh Choon Hooi

cc. Messrs Charles Rajah, A
Lim Seang Lee & Co.

[21] On 3 September 1992 the common solicitors couriered to Malayan Banking Bhd's solicitors all the completion documents for the transaction, B
namely the original land title, stamped transfer form, original consent to transfer, certified quit rent and assessment receipts, *the vendor's letter of undertaking dated 3 September 1992* and a sum of RM85 for the registration of transfer and withdrawal of caveat.

C
[22] On 10 September 1992 Malayan Banking Bhd's solicitors presented the transfer and charge documents to the land office for the registration of the transfer and charge.

[23] On 16 September 1992 Malayan Banking Bhd's solicitors advised the D
bank its interest was now fully protected to enable it *to release the loan sum of RM115,200* accordingly *to the vendor*.

[24] On 17 September 1992, Malayan Banking Bhd issued its *banker's* E
cheque for RM115,200 in favour of the vendor and forwarded it to its solicitors for their further action. The letter dated 17 September 1992 reads:

Dear Sirs,
Re: Yeo Liong Ho
Housing Loan Account No. 1-0529-6 F
With reference to your letter dated 16-9-1992, we enclose herewith our Banker's Cheque No. 294197 for $115,200/-f'g Loh Choon Hooi being balance purchase price due to her for your further attention.
Kindly acknowledge receipt. G
Yours faithfully,
For MALAYAN BANKING BERHAD
KHOO ENG KIM NEO
Housing Loan Department H

[25] Malayan Banking Bhd's solicitors couriered the cheque to the common solicitors on 19 September 1992 but on the same date the common solicitors wrote a letter to the purchaser to terminate the sale and purchase agreement on the ground the purchaser had failed to settle the balance of the I
purchase price by 17 September 1992. The common solicitors also wrote to Malayan Banking Bhd's solicitors on 19 September 1992 to demand for the discharge of the charge on the property and the return of the original issue document of title. The letter reads:

A Dear Sirs

Vendor: Loh Choon Hooi

Purchaser: Yeo Liong Ho

Property: Lot No. PT. 524, H.S. (M) 4637, Mukim Damansara, Daerah Petaling,
B Selangor

We refer to the above.

Kindly be informed that the vendor, Mdm. Loh Choon Hooi, has exercised her
C right to terminate the sale and purchase of the above property as the purchaser, Mr. Yeo Liong Ho, did not effect payment of the balance of the purchase price by 17th September 1992, being the last date fixed for the completion of the sale and purchase.

In consequence to the aforesaid termination, Mr Yeo Liong Ho is now required to
D re-transfer the property to Mdm. Loh Choon Hooi free of encumbrance and in particular free of your client's charge on the property forthwith.

Kindly notify us upon the presentation of the Discharge of Charge and let us have the presentation particulars.

We are further instructed to put you on notice and to require you to return to us,
E as solicitors for Mdm Loh Choon Hooi, the original issue document of title.

Yours faithfully,

cc. 1. Mr Yeo Liong Ho

2. Mdm Loh Choon Hooi
F

[26] On 21 September 1992, the common solicitors returned the cheque for RM115,200 to the bank's solicitors.

G **[27]** On 30 September 1992, the solicitor's for Malayan Banking Bhd wrote to the bank in respect of the housing loan of RM 115,200 favouring Mr Yeo Liong Ho ('the purchaser') advising, inter alia, in respect of the bank's letter of undertaking to the vendor and the registration of the memorandum of transfer prior to the settlement of the balance of the purchase price, in the
H following terms:

…

…

I The Bank's letter of undertaking to the Vendor dated 24/8/1992, undertaken only to release the loan. Further more the *Vendor has agreed and authorized the Bank's Solicitors to register the Memorandum of Transfer prior to the settlement* of the balance of the purchase price *on the Bank's undertaking to release the loan to her. This undertaking has been fulfilled by the Bank, whereby the release of the loan is within the time stated in the undertaking*.

(Emphasis added.)

[28] By a writ of summons and statement of claim dated 12 January 1993 the vendor ('the plaintiff') filed an action in the High Court Kuala Lumpur against the purchaser ('the defendant') for the following orders:

(i) Suatu perintah mengarahkan Defendan untuk medapatkan dalam tempoh dua-puluh satu (21) hari satu jaminan daripada Malayan Banking Berhad kepada siapa harta tersebut di cagarkan untuk melepaskan hakmilik yang asal bagi harta tersebut dan untuk mengesahkan pelepasan harta tersebut.

(ii) Suatu perintah mengarahkan Defendan untuk menyempurnakan Pindahmilik bagi harta tersebut kepada plaintif dalam tempoh dua-puluh satu (21) hari daripada tersebut.

(iii) Suatu perintah mengarahkan Pihak Berkuasa Negeri dalam tempoh dua-puluh satu (21) hari untuk memindahkan harta tersebut kepada Plaintif.

(iv) Bahawa Defendan mengirim milikan kosong harta tersebut dalam tempoh dua-puluh satu (21) hari daripada tarikh perintah.

(v) Ganti rugi atau sewa berganda-dua (double-rental) dari 17hb September, 1992 hingga pemberian milik kosong.

(vi) Kos.

(vii) Relief yang selanjutnya.

[29] The purchaser ('the defendant') filed his defence and counterclaimed for specific performance of the sale and purchase agreement as follows:

(i) Satu perintah selaras dengan Aturan 81 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk perlaksanaan dan/penyempurnaan perjanjian jual beli tersebut.

(ii) Gantirugi yang akan ditentukan oleh mahkamah yang mulia ini.

(iii) Faedah ke atas jumlah penghakiman pada kadar 8% setahun dari tarikh mengfailkan pembelaan dan tuntutan balas sehingga ke tarikh penyelesaian penuh.

(iv) Kos.

(v) Apa-apa relief yang lain yang difikirkan patut dan wajar oleh Mahkamah Yang Mulia ini.

[30] After a full trial the learned judge allowed the plaintiff's claim and dismissed the defendant's counterclaim with costs. On 15 May 2000 the High Court ordered as follows:

ADALAH DENGAN INI DIHAKIMKAN bahawa:-

(a) defendan dalam tempoh dua puluh satu (21) hari mendapat pelepasan cagaran dan menyerah hakmilik asal mengenai hartanah yang dikenali sebagai seunit Hakmilik Sementara No. HS(M) 4637, No. PT 524, Mukim Damansara, Negeri Selangor diatas mana terletak premises No. 14, Jalan PJS 7/20 kepada plaintif;

(b) defendan dalam tempoh dua puluh satu (21) hari menyerah kepada plaintif pindahmilik yang sah bagi hartatanah tersebut kepada plaintif;

(c) Pihak Berkuasa Negeri atau mana-mana pihak berkuasa memberi kesan kepada perintah ini;

(d) Ganti-rugi ditaksirkan oleh PKP;

(e) defenden membayar sewa dua-kali ganda sebulan dari 17-09-92 sehingg pemberian milikkan kosong;

(f) kos ditaksirkan dan di bayar oleh defendan.

DAN AKHIRNYA DIHAKIMKAN bahawa tuntutan-balas oleh defendan ditolak dengan kos.

[31] The defendant ('the purchaser') appealed against the High Court's decision on 15 May 2000 allowing the plaintiff's ('the vendor's') claim and dismissing the defendant's counterclaim. It would appear that the learned judge made that decision only because 'PW1 and PW2 were truthful and credible witness and their testimony is to be preferred as against DW1' and not for any other reason/s.

[32] No grounds of judgment of the learned High Court judge were available. A different panel of the Court of Appeal had granted an order on 13 August 2008 to dispense with the filing of the grounds of judgment — probably because the trial judge had already retired. This present panel hearing the appeal proper had the invidious task of perusing the record of appeal very carefully and in particular examining all the contemporaneous documentary evidence (as no reference whatsoever has been made by the trial judge to any of the documents in arriving at her decision).

[33] Documentary evidence have greater evidential value, on a balance of probability, in contrast to any oral testimony of witnesses with regard to determining the bona fides of the vendor in attempting to make time the

essence of the contract for the payment of the balance of the purchase price, after time became at large due to the vendor's own delay in obtaining the consent to transfer the property to the purchaser. These documents include the sale and purchase agreement, letters exchanged between the common solicitors and the solicitors of the purchaser's bank with regard to release of the loan (balance of purchase money), letters of undertaking by the vendor and delays by the vendor in giving such undertaking to the bank for refund of the purchaser's loan amount paid to the vendor (in the event the transfer of the property was rejected for registration), agreement by the vendor to allow the purchaser's bank to submit for registration the transfer and charge even before receipt of the balance of the purchase money by the vendor.

[34] Examination of these documents and the several correspondence between the parties would at once reveal that the only issue for us to determine is whether the vendor had acted lawfully, equitably and in good conscience in terminating the sale and purchase agreement by the notice of termination dated 19 September 1992 on the ground the balance of the purchase money had not been received on or before 17 September 1992, and consequently refusing to accept the banker's cheque for the balance of the purchase price received by the common solicitors in Penang on 21 September 1992 from the bank's solicitors in Kuala Lumpur.

[35] We are unanimous that the vendor has acted in bad faith and unconscionably in issuing the notice of termination on 19 September 1992 when the balance of the purchase price had already been dispatched from Kuala Lumpur to Penang on 19 September 1992.

[36] In this sale and purchase transaction the irresistible and inevitable conclusion is that the vendor has failed to demonstrate good faith and a genuine desire to complete the sale and purchase agreement because of more favourable market conditions for the vendor to obtain a higher price for the property.

[37] The vendor appears keener to terminate the sale rather than bring about an amicable conclusion of the transaction notwithstanding the purchaser's willingness to seek an amicable settlement in respect of the purported delay in the payment of balance purchase price. It is observed that the vendor's spokesman is her husband and that it is the husband who has been orchestrating and manipulating the common solicitors in this whole transaction. The vendor did not give any oral evidence at all. It was the husband of the vendor who gave oral testimony on her behalf.

[38] The vendor had delayed inordinately in obtaining the consent to transfer. Even before the vendor eventually obtained the consent on 20 May

A 1992 she had imposed a dateline of 21 August 1991 vide her letter dated 1 August 1991. As early as 1 August 1991 and throughout 1991 the vendor wanted to terminate the sale and purchase agreement but was advised by the common solicitors not to do so. This is reflected in the evidence of PW2 under cross-examination:

B

> Q: I put it to you that when you did not receive the money in August 1991, you did not terminate the Agreement?
>
> A: I did terminate verbally to the lawyer. Most requests to my lawyer were verbal.
>
> C Q: I put it to you that your lawyer did not convey your requests to the Defendant?
>
> A: I don't agree because the lawyer came back and informed me that the defendant could not be contacted as he was overseas.
>
> I was firm about termination but the lawyer kept persuading me to accept the extension.
>
> D
>
> I was convinced by the lawyer to proceed with the transaction.
>
> *I did not accept the sum of RM11,800/- which was paid in December 1991 because I was pushing for termination.*
>
> E Subsequentlly I was informed by my lawyer that if the Defendant did not pay the full amount I could forfeit the sum of RM11,800/-
>
> ...
>
> (Emphasis added.)

F

[39] We are of the view that, for all intents and purposes, the purchaser has in fact complied with the dateline set by the vendor in her letter dated 17 August 1992 to pay the balance of the purchase price, because the common solicitors received the banker's cheque on 21 September 1992. If at all, there was only a delay of four days on the basis the dateline was 17 September G 1992, but no delay at all if, a fair and proper computation of the period of one month is reckoned from the date of receipt of the notice dated 17 August 1992. In that situation the dateline would probably fall on 21 September 1992. It must be borne in mind that there was no evidence when the notice H was received. Although the notice was purportedly sent by AR registered post, the AR card was never produced to show the date of receipt by the purchaser. There was also no evidence of the actual date of posting by the vendor to the purchaser, notwithstanding the letter was dated 17 August 1992. However, the vendor had unilaterally fixed 17 September 1992 as the completion date in the notice (irrespective of when the notice was received by the purchaser). I

[40] In equity, time is not normally of the essence of a contractual term. However, in three types of case time is of the essence in equity, namely:

(a) where the contract expressly so stipulates;

(b) where the circumstances of the case or the subject matter of the contract indicate that the time for completion is of the essence (for example, the subject matter of the sale are shares of a company in a volatile market); and

(c) where a valid notice to complete has been given.

[41] There is no doubt that the sale and purchase agreement did stipulate that time was the essence of the contract. However, when the vendor was not able to obtain the consent to transfer in the time frame stipulated in the agreement, and the agreement was not terminated by the purchaser, time for completion by the purchaser was necessarily at large. In the circumstances, can the vendor make time of the essence by the service of a notice to complete, that is, by the letter dated 17 August 1992?

[42] We are of the view that *four requirements have to be satisfied* if time for completion is to be made the essence *by the service of a notice* viz:

(a) there must be no breach of the contract by the giver of the notice ('the innocent party');

(b) the giver of the notice has to be ready, willing and able to complete;

(c) the other party ('the guilty party') has to have been *guilty of unreasonable delay well before* a notice to complete can be served (however, this requirement may not be applicable where the subject matter of the sale is a hazardous or wasting asset); and

(d) the notice when served must limit a reasonable period within which completion is to take place.

(See *British and Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] 1 QB 842 at p 857.)

[43] Upon a careful perusal of the record of appeal and all the evidence adduced at the trial, we are of the view the vendor has not fulfilled requirement (a) and (b) above and further the purchaser has not been guilty of any delay prior to 17 August 1992. Therefore, we hold that the vendor can no longer make time of the essence by the letter dated 17 August 1992. There was no binding agreement reached for the purchaser to pay the balance of the purchase money on or before 17 September 1992 or for the bank to remit to the common solicitors within such a time and manner as to ensure it is received by them on or before 17 September 1992.

[44] In *Yap Hong Too & Anor v Wong Ah Mei & Anor* [1997] 1 MLJ 545 it was held by the Federal Court that:

A court of equity can grant relief against forfeiture when circumstances justify it. Similarly by extension of this rule, in an action for specific performance, for a purchaser who comes to court with clean hands, a court of equity can relieve the purchaser against the failure to comply with such a condition as to time in sale and purchase agreement where circumstances justify it.

[45] We are, therefore, of the view that even if there was a failure to comply with a condition as to payment of the balance of the purchase price before 17 September 1992, the trial court, in the exercise of its equitable jurisdiction, ought to have relieved the purchaser from any strict adherence to time because the purchaser in this case has most certainly come to court with clean hands viz:

(a) He (the purchaser) had secured a bank loan on 24 April 1991 to complete the sale and purchase agreement;

(b) He had paid the differential sum of RM11,800 to the vendor on 3 December 1991 eventhough he was not obliged to do so in law, as the vendor had still not obtained the consent to transfer (however, the vendor rejected it, ostensibly, because it was not paid on or before 21 August 1991 as stipulated in the vendor's letter dated 1 August 1991; nevertheless, the vendor received the differential sum paid again by the purchaser on 7 June 1992 and acknowledged receipt on 19 June 1992);

(c) The requirement of payment of the balance purchase money by the bank to the vendor within the stipulated time (unilaterally) by the vendor was *completely out of the purchaser's control*; and

(d) It was for the vendor and the common solicitors to resolve with the bank all the necessary pre-requisite compliance by the vendor, to ensure the release of the said balance purchase price by the bank to the vendor/common solicitors can be achieved on the date, as requested by the vendor.

[46] The learned trial court judge has failed to address her mind on this equitable issue and, therefore, clearly misdirected herself in law and fact.

[47] In the upshot, we are unanimous that this appeal is allowed with costs here and below.

[48] The order of the High Court dated 15 May 2000 was set aside. The counterclaim of the appellant ('the defendant') was allowed. There shall be an order for the specific performance of the sale and purchase agreement dated 22 February 1991. The balance of the purchase price (RM115,200) shall be paid within one month from 19 August 2009.

[49] Deposit to be refunded to the appellant.

Appeal allowed with costs here and below.

Reported by Kohila Nesan